

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION
STATE OF WASHINGTON

CONCERNED FRIENDS OF FERRY
COUNTY and DAVID L. ROBINSON,

Petitioners,

v.

FERRY COUNTY,

Respondent,

and

RIPARIAN OWNERS OF FERRY COUNTY
and FERRY COUNTY CATTLEMAN'S
ASSOCIATION,

Intervenors.

Case No. 01-1-0019

NINTH COMPLIANCE ORDER
[Agricultural Resource Lands]

I. SYNOPSIS

On November 13, 2012, the Board held a Compliance Hearing in Republic, Washington. The Board finds and concludes that Ferry County is not in compliance with the requirements of the Growth Management Act relating to the designation of Agricultural Lands of Long-Term Commercial Significance under RCW 36.70A.170, RCW 36.70A.030, RCW 36.70A.060(1)(b), and RCW 36.70A.020.

Between 2003 and 2013, the Board has issued 9 separate Orders Finding Continuing Non-Compliance with the GMA for Ferry County's failure to protect Agricultural Lands of Long-Term Commercial Significance.

II. BURDEN OF PROOF

After the Board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.¹ After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.² For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.³

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."⁴

Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth:

In recognition of the broad range of discretion that may be exercised by counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter, the legislature intends for the boards to grant deference to the counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201 (in part).

In sum, during compliance proceedings the burden remains on the Petitioner to overcome the presumption of validity and demonstrate that any action taken by the County is clearly

¹ RCW 36.70A.300(3)(b).

² RCW 36.70A.330(1) and (2).

³ RCW 36.70A.320(1), (2), and (3).

⁴ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

1 erroneous in light of the goals and requirements of chapter 36.70A RCW (the Growth
2 Management Act).⁵ Where not clearly erroneous and thus within the framework of state
3 goals and requirements, the planning choices of the local government must be granted
4 deference.
5

6 III. PROCEDURAL HISTORY

7 On December 21, 2001, a Petition for Review was filed in Case No. 01-1-0019 alleging *inter*
8 *alia* non-compliance with the GMA relating to Ferry County's failure to protect Agricultural
9 Lands of Long-Term Commercial Significance. On June 14, 2002, the Board issued a Final
10 Decision and Order finding Ferry County in non-compliance.
11

12 Between 2003 and 2011, the Board issued 8 separate Orders Finding Continuing Non-
13 Compliance with the GMA for Ferry County's failure to protect Agricultural Lands of Long-
14 Term Commercial Significance. Orders Finding Continuing Non-Compliance were issued on
15 December 16, 2003, August 27, 2004, June 14, 2006, June 9, 2008, February 20, 2009,
16 March 23, 2010, April 11, 2011, and December 16, 2011.
17

18 On September 24, 2012, the County adopted Ordinance Nos. 2012-04 and 2012-06
19 amending its comprehensive plan and development regulations with respect to agricultural
20 lands. Petitioners allege the amendments still fail to comply with the GMA.
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23 On November 13, 2012, the Board held a Compliance Hearing in Republic, Washington
24 involving three coordinated cases: Case Nos. 97-1-0018, 01-1-0019, and 06-1-0003. The
25 hearing panel for deciding these three cases is comprised of Raymond L. Paoella,
26 Presiding Officer, and Board members Chuck Mosher and Margaret Pageler (by telephone).
27 Attending the Compliance Hearing were: attorney Tim Trohimovich, representing Concerned
28 Friends of Ferry County, David L. Robinson, and Futurewise; Deputy Prosecuting Attorney
29 L. Michael Golden, representing Respondent Ferry County; David L. Robinson; and Ferry
30 County Planning Director Irene Whipple. At the beginning of the Compliance Hearing, the
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⁵ RCW 36.70A.320(2).

1 Board considered Petitioners' Corrected Motion to Supplement the Record (dated October
2 19, 2012) with 25 identified documents that were either produced by Ferry County or
3 provided to Ferry County during the public comment period. Ferry County indicated it had no
4 objection to Petitioners' Motion to Supplement, and the Board granted Petitioners' Motion to
5 Supplement the Record.
6

7 This Compliance Order decides the compliance issues presented in Case No. 01-1-0019
8 relating to Agricultural Lands of Long-Term Commercial Significance. Case Nos. 97-1-0018
9 and 06-1-0003 relating to Fish and Wildlife Habitat Conservation Areas were decided in a
10 separate Compliance Order issued on January 23, 2012.
11

12 IV. DISCUSSION

13 A. AGRICULTURAL LANDS OF LONG-TERM COMMERCIAL SIGNIFICANCE

14 1. Applicable Law

15 Each county shall designate where appropriate: "Agricultural lands that are not already
16 characterized by urban growth and that have long-term significance for the commercial
17 production of food or other agricultural products." RCW 36.70A.170(1).
18
19

20 The term "Agricultural land" is defined by statute as follows:

21 "Agricultural land" means land primarily devoted to the commercial production
22 of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal
23 products or of berries, grain, hay, straw, turf, seed, Christmas trees not
24 subject to the excise tax imposed by RCW 84.33.100 through 84.33.140,
25 finfish in upland hatcheries, or livestock, and that has long-term commercial
26 significance for agricultural production.⁶

27 The term "Urban growth" is defined by statute as follows:

28 "Urban growth" refers to growth that makes intensive use of land for the
29 location of buildings, structures, and impermeable surfaces to such a degree
30 as to be incompatible with the primary use of land for the production of food,
31 other agricultural products, or fiber, or the extraction of mineral resources,
32 rural uses, rural development, and natural resource lands designated
pursuant to RCW 36.70A.170. A pattern of more intensive rural development,

⁶ RCW 36.70A.030(2).

1 as provided in RCW 36.70A.070(5)(d), is not urban growth. When allowed to
2 spread over wide areas, urban growth typically requires urban governmental
3 services. "Characterized by urban growth" refers to land having urban growth
4 located on it, or to land located in relationship to an area with urban growth on
it as to be appropriate for urban growth.⁷

5 The term "Long-term commercial significance" is defined by statute as follows:

6 "Long-term commercial significance" includes the growing capacity,
7 productivity, and soil composition of the land for long-term commercial
8 production, in consideration with the land's proximity to population areas, and
9 the possibility of more intense uses of the land.⁸

10 In *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d
11 488, 502 (2006), the Washington Supreme Court held:

12 [A]gricultural land is land: (a) not already characterized by urban growth (b)
13 that is primarily devoted to the commercial production of agricultural products
14 enumerated in RCW 36.70A.030(2), including land in areas used or capable
15 of being used for production based on land characteristics, and (c) that has
16 long-term commercial significance for agricultural production, as indicated by
17 soil, growing capacity, productivity, and whether it is near population areas or
18 vulnerable to more intense uses. We further hold that counties may consider
19 the development-related factors enumerated in WAC 365-190-050(1) in
determining which lands have long-term commercial significance.

20 RCW 36.70A.170(2) provides that in making agricultural lands designations, counties and
21 cities shall consider the guidelines established by the Department of Commerce pursuant to
22 RCW 36.70A.050(1). Under RCW 36.70A.050, these are "minimum guidelines" that apply to
23 all jurisdictions "to guide the classification" of agricultural lands. The Department of
24 Commerce "minimum guidelines" are codified in WAC Chapter 365-190.

25 WAC 365-190-050(3)(b)(ii) provides that in determining whether lands are used or capable
26 of being used for agricultural production, counties and cities shall use the land-capability
27 classification system of the United States Department of Agriculture Natural Resources
28 Conservation Service as defined in relevant Field Office Technical Guides. These eight
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⁷ RCW 36.70A.030(19).

⁸ RCW 36.70A.030(10).

1 classes are incorporated by the United States Department of Agriculture into map units
2 described in published soil surveys, and are based on the growing capacity, productivity and
3 soil composition of the land.

4
5 WAC 365-190-050(3)(c) provides 11 non-exclusive criteria that counties should consider in
6 determining whether the land has long-term commercial significance for agriculture:

7
8 (i) The classification of prime and unique farmland soils as mapped by the
9 Natural Resources Conservation Service;

10 (ii) The availability of public facilities, including roads used in transporting
11 agricultural products;

12 (iii) Tax status, including whether lands are enrolled under the current use
13 tax assessment under chapter 84.34 RCW and whether the optional public
14 benefit rating system is used locally, and whether there is the ability to
15 purchase or transfer land development rights;

16 (iv) The availability of public services;

17 (v) Relationship or proximity to urban growth areas;

18 (vi) Predominant parcel size;

19 (vii) Land use settlement patterns and their compatibility with agricultural
20 practices;

21 (viii) Intensity of nearby land uses;

22 (ix) History of land development permits issued nearby;

23 (x) Land values under alternative uses; and

24 (xi) Proximity to markets.

25 When applying the criteria for long-term commercial significance, "the process should result
26 in designating an amount of agricultural resource lands sufficient to maintain and enhance
27 the economic viability of the agricultural industry in the county over the long term; and to
28 retain supporting agricultural businesses, such as processors, farm suppliers, and
29 equipment maintenance and repair facilities."⁹

30 Each county shall adopt development regulations to assure the conservation of designated
31 agricultural lands – these development regulations shall assure that the use of lands
32 adjacent to agricultural lands shall not interfere with the continued use, in the accustomed

⁹ WAC 365-190-050(5).

1 manner and in accordance with best management practices, of these designated lands for
2 the production of food or agricultural products.¹⁰ RCW 36.70A.060(1)(b) provides:

3 Counties and cities shall require that all plats, short plats, development
4 permits, and building permits issued for development activities on, or within
5 five hundred feet of, lands designated as agricultural lands, forest lands, or
6 mineral resource lands, contain a notice that the subject property is within or
7 near designated agricultural lands, forest lands, or mineral resource lands on
8 which a variety of commercial activities may occur that are not compatible
9 with residential development for certain periods of limited duration. The notice
10 for mineral resource lands shall also inform that an application might be made
11 for mining-related activities, including mining, extraction, washing, crushing,
12 stockpiling, blasting, transporting, and recycling of minerals.

13 Development regulations shall be consistent with and implement the comprehensive plan.
14 RCW 36.70A.040(4)(d).

15 One of the 13 planning goals of the GMA addresses natural resource industries: "Maintain
16 and enhance natural resource-based industries, including productive timber, agricultural,
17 and fisheries industries. Encourage the conservation of productive forest lands and
18 productive agricultural lands, and discourage incompatible uses." RCW 36.70A.020(8).

19 Under the GMA, "natural resource lands," include agricultural, forest, and mineral resource
20 lands. "Natural resource lands are protected not for the sake of their ecological role but to
21 ensure the viability of the resource-based industries that depend on them. Allowing
22 conversion of resource lands to other uses or allowing incompatible uses nearby impairs the
23 viability of the resource industry."¹¹
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31 ¹⁰ RCW 36.70A.060(1)(a).

32 ¹¹ *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 47 (1998) (quoting
Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present,
and Future*, 16 U. Puget Sound L. Rev. 867 (1993))

1 **2. Prior Compliance Order**

2 In Case No. 01-1-0019 (December 16, 2011 Compliance Order), the Board found Ferry
3 County out of compliance with the GMA relating to Agricultural Lands of Long-Term
4 Commercial Significance in part as follows:

- 5 • Ferry County's designation criteria for Agricultural Lands of Long-Term Commercial
6 Significance do not comply with the requirements in RCW 36.70A.170 and RCW
7 36.70A.030.
- 8 • There is no substantial evidence in the record to support a finding that Ferry County
9 considered all three statutory Factors in designating Agricultural Lands of Long-Term
10 Commercial Significance.
- 11 • Ferry County failed to comply with the requirements in RCW 36.70A.170 and RCW
12 36.70A.030 to designate Agricultural Lands of Long-Term Commercial Significance.
- 13 • Ferry County has made no Findings of Fact as to why it does not intend to designate
14 any private farm land or any fee lands within the Colville Indian Reservation as
15 Agricultural Resource Lands
16

17 **3. Recent Legislative Action by Ferry County**

18 On September 24, 2012, the Board of Ferry County Commissioners adopted two ordinances
19 and submitted two documents into the record in response to the Board's December 16,
20 2011 Compliance Order:
21

- 22 • Ordinance #2012-04, amending Ordinance #2011-04, and updating Sections 7.4.17,
23 7.4.30, 7.7.31, 7.7.35, 7.4.42, 7.7.5 and 7.7.6, relating to agricultural lands.¹²
- 24 • Development Regulations Ordinance #2012-06, amending Development Regulations
25 Sections 9.00, 9.01 and 9.02, relating to the designation and protection of Agricultural
26 Lands of Long-Term Commercial Significance and presenting introductory facts
27 about Ferry County agriculture.¹³
- 28 • Background and Analysis Information submitted into the record by the Ferry County
29 Board of Commissioners on 9/24/12.¹⁴
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¹² Ferry County's Index to Compliance Report, Attachment 1 (October 8, 2012).

¹³ *Id.*, attachment 3.

¹⁴ *Id.*, attachment 4.

- A spreadsheet of information compiled from the 2007 Census of Agriculture for Ferry County, WA. Dated 9/17/2012 submitted into the record by the Ferry County Board of Commissioners on 9/24/12.¹⁵

4. Positions of the Parties

Petitioners argue that Ferry County has failed to properly designate Agricultural Lands of Long-Term Commercial Significance in the County as a result of serious errors of law and fact, as a result of the following factors:

- (1) Ferry County has used a Background and Analysis Information paper to designate Agricultural Lands but the factors used in the selection process are inconsistent with Ferry County's Comprehensive Plan Policies and this violates RCW 36.70A.070, RCW 36.70A.120 and RCW.36.70A.130(1)(d);
- (2) The selection criteria in the Background and Analysis Information paper violate RCW 36.70A.170 and RCW 36.70A.030(2) and (10) because (a) the paper doesn't consider those areas actually used for agriculture as shown in USDA maps, (b) the lands they have designated using this method have poor soil types, (c) the paper doesn't consider all three key factors including soil types, growing capacity and productivity, (d) point scores given for proximity to developed areas are unsupported, (e) point scores given for farm size are unsupported by fact and are inconsistent with County Planning Policies, and (f) the paper used a "block group" criteria to exclude any agricultural lands of less than 1,000 contiguous acres from designation;
- (3) Since the method to select Agriculture Lands of Long-Term Commercial Significance was inconsistent with Ferry County's Comprehensive Plan and the selection criteria violate the Act, the resulting Ferry County Future Land Use Map is clearly erroneous; and
- (4) Ferry County's Development Regulations are not adequate to protect Ferry County's agricultural lands of long-term commercial significance.¹⁶

¹⁵ *Id.*, attachment 5.

¹⁶ Concerned Friends of Ferry County's, David L. Robinson's, and Futurewise's Concurrence in and Objections to a Finding of Compliance and Petition for Imposition of Invalidity, pp. 26-46 (October 19, 2012).

Respondent Ferry County asserts that:

- (1) Ferry County has amended its Comprehensive Plan to provide that Agricultural Lands of Long-Term Commercial Significance are given priority for exclusion from proposed UGA expansions.
- (2) Ferry County has amended its Comprehensive Plan to provide an objective, verifiable process for designating Agricultural Lands of Long-Term Commercial Significance, and
- (3) Ferry County has properly designated and mapped Ferry County Agricultural Lands of Long-Term Commercial Significance.¹⁷

5. Board Analysis – Agricultural Lands of Long-Term Commercial Significance

Ferry County reports there are a total of 749,452 acres of land in agricultural production in Ferry County, with 459,545 acres in National Forest grazing allotments and 19,423 acres of land representing state forest grazing leases.¹⁸ Of the total lands in agricultural production, an estimated 25,215 are privately owned.¹⁹ In addition, Ferry County reports that Colville Tribal Lands constitute 49% of the total land area in Ferry County and that these lands form a significant part of the natural resource base of the County, including tribal lands leased for grazing.²⁰ An estimated 575,000 acres of Tribal land are in pasture, with an estimated 10,000 acres classified agriculture lands which include hay production. Of the total Tribal land, 104,539 acres are agricultural fee lands.²¹

Petitioners have the burden to prove noncompliance as to the designation of Agricultural Resource Lands. The challenged actions (Ferry County Ordinances 2012-04 and 2012-06 and the use of a Background and Analysis Information paper criteria to designate Ferry County's Agricultural Lands of Long-Term Commercial Significance) will now be reviewed to

¹⁷ Ferry County's 2012 Response to Petitioners Objections, pp. 11-26 (October 29, 2012).

¹⁸ Ferry County's Index to Compliance Report (October 8, 2012), attachment 2, p.2.

¹⁹ Ferry County's Index to Compliance Report (October 8, 2012), Attachment 3, p.3.

²⁰ Ferry County's 2012 Response to Petitioner's Objections (October 2, 2012), p.13.

²¹ Ferry County's 2012 Supplemental Index to Compliance Report (November 1, 2012), index 631.

1 determine whether the statutory requirements for designating and conserving Ferry
2 County's Agricultural Resource Lands were considered and complied with.

3
4 **Ferry County Ordinance 2012-04, Amending Ordinance #2011-04**

5 The Petitioners acknowledge that the revised planning policies for Agriculture in Sections
6 7.4.30(6) and 7.4.31 of Ferry County's Comprehensive Plan are now compliant with the
7 requirements of the Growth Management Act with regard to selecting which lands to
8 designate as Agricultural Lands of Long-Term Commercial Significance.
9

10 However, Petitioners allege a document entitled "Background and Analysis Information"²²
11 violates RCW 36.70A.070 [internal plan inconsistency] and RCW 36.70A.130(1)(d)
12 [development regulation/plan inconsistency]. Petitioners assert that the Background and
13 Analysis Information document is inconsistent with Comprehensive Plan Policy Sections
14 7.4.30(6) and 7.4.31. The record does not indicate whether the Background and Analysis
15 Information was formally adopted as County policy, and this document does not appear to
16 be part of Ordinance 2012-04 although it was submitted into the record at the time
17 Ordinance 2012-04 was adopted.
18
19

20 In their briefing and arguments, Petitioners have not identified specific language in
21 Ordinance 2012-04 that is inconsistent with Comprehensive Plan Policy Sections 7.4.30(6)
22 and 7.4.31. Further, Petitioners have not shown how specific language in Ordinance 2012-
23 04 violates the statutory criteria for Agricultural Lands of Long-Term Commercial
24 Significance in RCW 36.70A.030. Finally, Petitioners have not shown how the policy
25 amendments in Ordinance 2012-04 violate the statutory requirement to designate
26 Agricultural Lands of Long-Term Commercial Significance in RCW 36.70A.170. Therefore,
27 Petitioners have failed to satisfy their burden of proof to show non-compliance as to Policy
28 Sections 7.4.30(6) and 7.4.31 in Ordinance 2012-04.
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²² Ferry County's Index to Compliance Report, Attachment 4 (October 8, 2012).

Ferry County Ordinance 2012-06, Amending Ordinance 2011-03

Petitioners challenge Ferry County Development Regulations Ordinance 2012-06, alleging plan inconsistencies and non-compliance relating to the designation of Mineral Resource Lands and Forest Resource Lands. The Board notes that Ferry County's Mineral Resource Lands and Forest Resource Lands were addressed in the Final Decision and Order issued on December 17, 2012 under EWGMHB Case No. 11-1-0003. Moreover, the Eighth Compliance Order issued in this Case No. 01-1-0019 did not decide any issues concerning Mineral Resource Lands and Forest Resource Lands. Mineral Resource Lands and Forest Resource Lands fall outside of the scope of the compliance issues in Case No. 01-1-0019, and the Board cannot address them at this time in this case.

Future Land Use Map and Background and Analysis Information paper

Ferry County's Comprehensive Plan, Section 7.4.34 states: "The Comprehensive Plan Future Land Use Map designates Agricultural Lands of Long-Term Commercial Significance."²³ In the December 16, 2011 Compliance Order, the Board found that the record did not contain "Ferry County's Comprehensive Plan Future Land Use Map."²⁴ Ordinance 2012-04, which amended Ferry County's Comprehensive Plan on September 24, 2012, also does not contain the Future Land Use Map. Development Regulations Ordinance 2012-06 does have an attachment called "Ferry County Comprehensive Plan Future Land Use Map."²⁵

This Future Land Use Map shows public lands, private lands, and Agricultural Lands of Long-Term Commercial Significance. This map designates publicly owned Agricultural Lands on national and state forest lands. This map does not designate private lands nor does it designate lands owned in fee by non-native Americans within the Colville Indian Reservation. The County made no findings as to why it only designated publicly-owned land.

²³ Ferry County's Index to Compliance Report, Attachment 1, p. 6 (October 8, 2012).

²⁴ Eighth Compliance Order, p. 12 (EWGMHB Case No. 01-1-0019, December 16, 2011).

²⁵ Ferry County's Index to Compliance Report, Attachment 3 (October 8, 2012).

1 The Future Land Use Map appears to be the product of applying the agricultural land
2 designation criteria listed in the document called "Background and Analysis Information."
3 The Board will now consider these local designation criteria.
4

5
6 (1) Regarding the use of a point system for selecting Agricultural Lands of Long-Term
7 Commercial Significance, nothing in policy 7.4.30(6) precludes a point system as long as
8 the system is an area wide process and an analytical process applied equally to all lands
9 subject to possible designation.²⁶
10

11 (2) Regarding the factors used to award points, although most are based on the selection
12 criteria contained in WAC 365-190-050, two factors inappropriately give negative points for
13 close proximity to urban areas. This penalty of being awarded negative points near built
14 areas is inconsistent with reported determinations by the County that the main farming
15 practice in Ferry County is cattle and because this is non-aggressive (low use of pesticides
16 and fertilizers), the County typically doesn't require buffers between agricultural lands and
17 new development.
18

19
20 The paper gives points based on farm size, with more points given to larger farms, but the
21 land must be contiguous and owned and excludes all lots of 20 acres or less. Since
22 individual farms may include some smaller lots, may include land that is not contiguous and
23 may include rental lands and leased land with disparate ownership, this criteria
24 unreasonably excludes agricultural lands capable of long-term commercial use.
25

26 In addition to the point system, the paper notes that to even be considered for selection,
27 farms must be in a contiguous block of 1,000 or more acres. This exclusionary factor
28 appears to duplicate and arbitrarily negate the use of the point system criteria that already
29 assigns points based on farm size, thereby limiting selection of all but the largest farms.
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²⁶ Natural Resource Policy 7.4.30(6), "The process shall be an objective analytical process to access lands potentially suitable for agricultural uses applied equally to all lands subject to possible designation."

1 3) Although Ferry County has designated a large amount of land as Agricultural Lands of
2 Long-Term Commercial Significance, all of this land is either Washington Department of
3 Natural Resources or Forest Service land that is associated with grazing permits for cattle.
4 No private lands used for cattle or hay production have been designated as Ferry County
5 Agricultural Lands of Long-Term Commercial Significance. By designating no private land
6 as agricultural land of long-term commercial significance, the County jeopardizes the
7 industry by not designating, mapping, and protecting Ferry County Agricultural Lands of
8 Long-Term Commercial Significance.
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11 In order to graze on a National Forest, a rancher or farmer must obtain a Forest Service
12 grazing or livestock permit and, to be eligible for this permit, the rancher or farmer must own
13 a "base property." A "[b]ase property is land and improvements owned and used by the
14 permittee for a farm or ranch operation and specifically designated by him to qualify for a
15 term grazing permit." By not designating and protecting any privately owned "base
16 properties," Ferry County is putting not only the base properties but the key Ferry County
17 grazing lands on Forest Service lands in jeopardy.
18

19
20 In addition, no private hay lands have been designated and hay is an important crop
21 supporting the cattle industry, particularly during the winter months to supplement usually
22 available foraging crops. Since the Forest Service only allows grazing in the Colville and
23 Okanogan-Wenatchee National Forests, it is important for this critical crop to be grown on
24 nearby private lands.
25

26 The Board finds that applying these criteria violates the minimum guideline directive that
27 "the process should result in designating an amount of agricultural resource lands sufficient
28 to maintain and enhance the economic viability of the agricultural industry in the county over
29 the long term; and to retain supporting agricultural businesses, such as processors, farm
30 suppliers, and equipment maintenance and repair facilities."²⁷
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²⁷ WAC 365-190-050(5).

1 One basis for the non-designation of any private farmlands for Ferry County appears to be
2 the exclusionary result of its point system selection process. An additional exclusionary
3 factor is the County's threshold criterion: Table B in the County's Background and Analysis
4 Information paper shows a large number of properties that have been excluded from
5 designation because they don't individually meet a County designated threshold which
6 requires each section of land to be capable of assuring the viability of agriculture over the
7 long-term. This is a misapplication of the WAC 365-190-050(5) criteria that requires the
8 County to consider enough agricultural lands in total for the whole County to provide for
9 agricultural sustainability, not each section of land.

11
12 The County reports that although the total amount of grazing land managed by the Colville
13 Tribe is included in the estimate of land available for agriculture in the County, it cannot
14 designate land or set policy on these lands. Although Ferry County asserts regulatory
15 authority over lands owned in fee by non-native Americans within the Colville Reservation
16 as provided in *Brendale v. Yakima Indian Reservation*, 492 U.S. 408 (1989), it has not
17 designated any of these lands as Agricultural Lands of Long-Term Commercial Significance.

19 **Conclusions:**

- 21 • Ferry County has not adequately designated Ferry County Agricultural Lands of
22 Long-Term Commercial Significance. By not designating any privately owned lands,
23 none of the grazing lands currently designated by the County are supported by base
24 properties. Also, no Colville Reservation fee lands have been designated.
25 Therefore, the Board finds and concludes that key Ferry County agricultural lands are
26 not being designated and protected as required by RCW 36.70A.170, RCW
27 36.70A.030, RCW 36.70A.060(1)(b), and RCW 36.70A.020 . This is not consistent
28 with Ferry County's Planning Policies and WAC 365-190-050(5), which requires that
29 the result must designate adequate resource lands to maintain and enhance the
30 economic viability of the agricultural industry in the County over the long run and is in
31 violation of RCW 36.70A.170, RCW 36.70A.030, RCW 36.70A.060(1)(b), and RCW
32 36.70A.020.

- Ferry County has made no Findings of Fact as to why it does not intend to designate any private farm land or any fee lands within the Colville Indian Reservation as Agricultural Resource Lands.
- Ferry County failed to comply with the requirements in RCW 36.70A.170 and RCW 36.70A.030 to designate Agricultural Lands of Long-Term Commercial Significance.
- The Board is left with the firm and definite conviction that a mistake has been made in Ferry County's failure to designate and conserve Agricultural Lands of Long-Term Commercial Significance.
- Ferry County's Future Land Use Map is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act.

B. INVALIDITY

For Ferry County's failure to designate agricultural lands, Petitioners request that the Board "impose invalidity on Ferry County's Future Land Use Map and apply invalidity to all lands with land use capability soils 2 through 4 and all lands within 500 feet of these areas."²⁸

Respondent asserts there is no basis for invalidity.²⁹

Under RCW 36.70A.302(1), the Board may determine that part or all of a comprehensive plan or development regulations are invalid if the Board:

- (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
- (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
- (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

²⁸ Concerned Friends of Ferry County's, David L. Robinson's, and Futurewise's Concurrence in and Objections to a Finding of Compliance and Petition for Imposition of Invalidity, p. 52(October 19, 2012).

²⁹ Ferry County's 2012 Response to Petitioners Objections, p. 27 (October 29, 2012).

1 The Board finds that Petitioners have failed to identify particular parts of the plan or
2 regulations that should be found invalid and that substantially interfere with fulfillment of the
3 goals of the GMA. Petitioners have failed to show how invalidity would protect any
4 agricultural lands or promote fulfillment of specific GMA goals.
5

6
7 As to Petitioners' request to apply invalidity to lands with certain soil types, the Board finds
8 this argument to have no merit. The Board's invalidity authority is limited by statute to
9 potential invalidation of comprehensive plans and development regulations. There is no
10 statutory authority to apply invalidity to land. Accordingly, the Board declines to issue a
11 determination of invalidity.
12

13 V. ORDER

14 Ferry County is not in compliance with the requirements of the Growth Management Act
15 relating to the designation and conservation of Agricultural Lands of Long-Term Commercial
16 Significance under RCW 36.70A.170, RCW 36.70A.030, RCW 36.70A.060(1)(b), and RCW
17 36.70A.020.
18

19
20 This case is remanded to Ferry County. Ferry County is ordered to bring its Comprehensive
21 Plan and Development Regulations into compliance with the Growth Management Act
22 according to the following schedule:
23

Item	Date Due
Compliance Due	June 28, 2013
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	July 12, 2013
Objections to a Finding of Compliance	July 26, 2013
Response to Objections	August 5, 2013
Compliance Hearing – Telephonic Call 1-800-704-9804 and use pin 5721566#	August 15, 2013 10:00 a.m.

1 Entered this 8th day of February, 2013.
2
3

4 _____
Raymond L. Paolella, Board Member

5
6 _____
7 Charles Mosher, Board Member

8
9 _____
10 Margaret Pageler, Board Member

11
12 **Note: This is a final decision and order of the Growth Management Hearings Board**
13 **issued pursuant to RCW 36.70A.300.³⁰**
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29 _____
30 ³⁰ Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on
all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
31 A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty
32 days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth
Management Hearings Board is not authorized to provide legal advice.